UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

SIERRA VERDE PLUMBING LLC.

and Case 28-CA-209991

ERNEST RODRIGUEZ, an Individual

SIERRA VERDE PLUMBING LLC'S POST-HEARING BRIEF

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INTRODUCTION

Respondent Sierra Verde Plumbing LLC ("Respondent" or "SVP") files its post-hearing brief in opposition to the unfair labor practices (ULP) charges filed against it under Sections 8(a)(1) and 8(a)(4) of the National Labor Relations Act ("NLRA") related to Ernest Rodriguez's ("Rodriguez") termination after his brief period of employment. (GC Exh. 1.) As the credible, relevant evidence of the record—including consistent testimonies of Mark Millan (former general manager), Robert Torres (former superintendent), Ralph Cozzolino (SVP managing partner), and Amando Encinas (SVP co-owner who oversees operations)—establishes, Rodriguez had poor performance, he didn't complete his tasks or follow simple directions, and he was also a terrible communicator, regularly hanging up the phone on his supervisor and management and not timely responding to text messages. After repeated counseling, Rodriguez failed to improve and was terminated for legitimate, non-discriminatory reasons—insubordination based on failure to follow instructions and failure to communicate. Not only was Rodriguez terminated for legitimate, non-discriminatory reasons, the record also clearly establishes that Rodriguez did not even engage in any conduct protected by the NLRA. Rather, after he was terminated, he threatened to beat up his manager, used profanity, put his hands on this manager, and only after all this claimed, without providing any explanation or basis, that he was "going to go to the board," that he would "own the company," and get "lots of people fired." This type of belated, vague, and threatening behavior is not protected conduct under the NLRA. Rodriguez's other allegations of protected activity in which he claims that he told Torres (who was not a final decision-maker in the termination) that he was "going to the board", as demonstrated below, are blatantly false, and even if accepted as true, impute no knowledge of the alleged protected activity to the final decision-makers; therefore, again, failing to establish any

liability of SVP under the NLRA. These charges against SVP should be dismissed in their entirety with prejudice.

FACTUAL BACKGROUND

I. SIERRA VERDE PLUMBING

Sierra Verde Plumbing (SVP) provides residential plumbing services in the greater Phoenix metropolitan area. (Tr. 27:13-16, 38.) SVP is owned by Jesus Encinas, Ralph Cozzolino, and Amando Encinas. (Tr. 27-28.) Cozzolino is the managing partner for SVP's plumbing operations (Tr. 46) and Amanda Encinas is responsible for overseeing SVP's operations. (Tr. 27.)

II. RODRIGUEZ'S BRIEF EMPLOYMENT WITH SVP

A. The Pickup Position

Rodriguez, who has filed at least four other NLRB charges and claims he can't even remember whether he filed a NLRB charge against his prior employer, Whitton Plumbing (Tr. 189-190) worked for SVP for around four months (May to September 2017) (Tr. 137:4-11, 52, 213:15-19) in the "pickup" position. A pickup, is a repairman whose main function is to repair other crew members' mistakes as well as complete other various plumbing tasks. (Tr. 29.) Sometimes Rodriguez would complain about fixing others' work or patching up somebody else's mistakes; however, that specific work (fixing problems) was part of his job. (Tr. 80-81.) Rodriguez also regularly texted photos to his supervisor criticizing others mistakes—for some reason, regularly sending these photos to his supervisor's personal cell phone rather than his work phone. (GC Exh. 5 (text messages to Torres' work phone); GC Exh. 6 (text messages to Torres' personal cell phone; Tr. 132:19-24, 192:18-193:3). When Rodriguez worked at SVP, he

was one of about four pickup persons. (Tr. 29.) However, Rodriguez did not really know any of the other pickups and never talked with them about work. (Tr. 183:17-25.)

In or around July 2017 (137:4-14), Rodriguez began reporting to newly hired Robert Torres, superintendent, who reported to Mark Millan, general manager/operations manager. (Tr. 48, 58, 62.) Torres has fourteen years of experience in plumbing, including past experience in the pickup role. (Tr. 116:18-117:2.) Millan managed about eight superintendents, including Torres, as well as employees underneath the superintendents and yard employees. (Tr. 58.) Neither Torres nor Millan are currently employed by SVP. (Tr. 82:20-25, 266:4-14.)

B. Rodriguez Fails To Follow Work Instructions And Complete Jobs

At the beginning of the workday, Rob Torres, Rodriguez's direct supervisor, would give him a list of projects to complete that day, which were numbered and listed based on priority for Rodriguez to complete. (Tr. 90-91, 107-108.) Generally, Rodriguez was instructed to complete tasks in one community first, followed by others. (Tr. 91-92.) The following morning, Rodriguez was responsible for reporting to Torres whether all his work was completed. (Tr. 91-92.) When Torres started supervising Rodriguez, he almost immediately noticed Rodriguez's performance issues (Tr. 105-106), including a failure to follow very simple directives. (Tr. 91-92, 95, 108.)

Despite being given a prioritized list, Rodriguez often strayed off course, completing tasks out of order. (Tr. 108.) Sometimes Rodriguez was simply not where he was supposed to be and was instead at a different site. (Tr. 284:6-8.) While Rodriguez was responsible for reporting whether projects were completed; sometimes, when his supervisor, Torres, inquired about a certain project he should have completed the day prior, Rodriguez claimed that he had finished it, but Torres would ultimately discover that the job had not been done and he (Torres) would have to go do it himself. (Tr. 91-92, 95.) On one occasion, Rodriguez was directed to

move some bullhorns on a Friday and when Torres discovered Rodriguez had failed to timely do the job, he had to complete the task himself on Saturday. (Tr. 102:7-9, 246-247.) On another occasion, Torres directed Rodriguez to put some walls up and supplied him with the materials; however, instead of doing the job, Rodriguez went home and did not tell anyone. (Tr. 102:9-15.) Rodriguez's failure to follow through on jobs and communicate with his supervisor negatively impacted SVP's customers. (*E.g.*, Tr. 101-102.) For example, on one occasion, Torres directed Rodriguez to test the water and connect it to a meter at a house; however, Torres got a call the next day that Rodriguez did not do the job resulting in the home failing an inspection. (Tr. 101-102.)

It was not just Torres' instructions that Rodriguez failed to follow. (Tr. 277-278, 284-285.) Rodriguez also failed to complete jobs as directed by Mark Millan (Torres' manager) on multiple occasions. (Tr. 284:11-285:1.) SVP also received reports from Mitch Blackman, a builder superintendent from Woolside Homes (not SVP employee) (TR. 285:10-16), who Rodriguez and Torres referred to as the "paparazzi" (Tr. 247:7-20), that Rodriguez was failing to complete his jobs, even when Rodriguez claimed to have done them. (Tr. 277-278.)

C. Rodriguez Fails To Adequately Communicate With His Supervisor(s)

In addition to simply failing to complete his work tasks, Rodriguez had serious communications problems. (Tr. 95, 232-233, 281-282.) Rodriguez regularly hung up the phone on his supervisor, Torres, as well as Mark Millan (general/operations manager) during work calls. (Tr. 95, 232-233, 281-282.) Rodriguez hung up on Torres at least 10 times during their brief working relationship—generally when Torres was directing him to do a task that Rodriguez presumably did not want to do. (Tr. 232-233.) Rodriguez now claims that sometimes his phone would drop, but concedes that he only had "one conversation" with Torres addressing a dropped call. (Tr. 217:1-4, 232.) Not only did Rodriguez hang up on his supervisor, he also hung up on

Mark Millan (Torres's supervisor) at least 5 times during his brief stint of employment. (Tr. 281:16-283:6.) Generally, Rodriguez hung up when Millan was still speaking and Rodriguez did not appear to like where the conversation was going. (Tr. 282:12-16.) For example, one time Rodriguez hung up on Millan when Millan was counseling him on the importance of finishing tasks and that Rodriguez needed to be honest with the Company on whether tasks are being property completed since the Company relies on what he's saying when communicating with clients. (Tr. 282:21-6.) Millan tried to call Rodriguez back around five times yet he did not pick up. (Tr. 283:11-16.) Rodriguez never told Millan that a call had ended because he lost signal. (Tr. 282:1-4.)

At times, Rodriguez was also not responsive to his supervisor's, Torres', text messages. (Tr. 95.) For instance, on one occasion, Rodriguez concededly did not respond to his supervisor's text message for over two hours. (Tr. 218.) Another day, Torres texted Rodriguez three times about jobs and Rodriguez did not respond to any text messages until approximately 24 hours later. (Tr. 251, GC Exh. 5, 47-48.) Rodriguez was also unprofessional at times in his text message exchanges with his supervisor. (Tr. 141, 244-255.) While Rodriguez claims he was just joking around with his supervisor (Tr. 195-196), he would regularly tell Torres that Millan was his "girlfriend" (Tr. 141, GC Exh. 5, p.28) or callTorres a "buster", which Torres found to be unprofessional and derogatory (Tr. 244-245). Generally, Torres did not respond with jokes (Tr. 198) and tried to be the "bigger person." (245:2-6.)

Rodriguez was often confrontational and combative with his supervisor when being assigned work—raising his voice, using profanity. (Tr. 115, 246:7-9.) Torres was a new supervisor and simply trying his best to get through a lot of work and avoid Rodriguez's unnecessary combativeness confrontation. (Tr. 115:7-17, 245:6-10.) Torres addressed these

issues with Rodriguez (e.g., hanging up during the middle of telephone calls or not answering calls); however, Rodriguez provided no legitimate explanation for his behavior, and instead would just walk away when his supervisor would try to counsel him. (Tr. 116.)

In addition to being rude and combative to his supervisor and manager, SVP also received reports that Rodriguez had a bad attitude, was rude, combative, and argumentative with building superintendent, Blackman. (Tr. 277-278, 295:10-296:12.) Blackman also reported to SVP that Rodriguez would also hang up on him during phone calls. (*Id.*) As noted above, Blackman had also reported to SVP that Rodriguez also failed to follow instructions and complete jobs. (Tr. 277-78.)

D. SVP Tries To Counsel Rodriguez On These Issues

Rodriguez was coached on these performance and communications issues. (Tr. 106, 114, 116.) On multiple occasions, Torres directed Rodriguez that he needed to follow through, complete jobs, and if he failed to complete a particular job, he still needed to go back and complete it the next day. (Tr. 106, 114, 116; GC Exh. 5, p. 66, p. 69.) This is documented in text message exchanges between Torres and Rodriguez; including Torres instructing Rodriguez to "follow through and finish the job, ur the last one to look at it. If you don't have the part u need to go back the next day or two to complete it." (GC Exh. 5, p. 66); and Torres telling Rodriguez that "what u don't do on your schedule that day need to be finished the next day. I shouldn't have to put it on the schedule again you should know what hasn't been doing. Ur doing the work." (GC Exh. 5, p. 69). Torres tried to motivate Rodriguez to do his work, to no avail. (Tr. 106. 285:2-6.) Sometimes Rodriguez would make up excuses for not doing his work, that he was in a different location or that he didn't have the tools (Tr. 109-110.) On at least one occasion regarding the latter, Torres offered to bring him the necessary tools, but Rodriguez was

already long gone. (Tr. 109-110.) On another occasion, Millan brought Rodriguez tools and Rodriguez still didn't finish the job. (Tr. 284:18-285:3.)

Torres brought up these issues to his supervisor, Millan, on multiple occasions and as early as August 16, 2017, who told him to work with Rodriguez, which Torres tried to do. (Tr. 111-112, 285:24-285:1; *see also* GC Exh. 3 (noting an August 16 and August 31 report from Torres to Millan).) Millan also addressed performance issues with Rodriguez directly on a number of occasions, including issues with Rodriguez failing to complete his work. (Tr. 62.) Millan also instructed Rodriguez that he needed to communicate with his superintendent (rather than hang up on him during calls). (Tr. 68.) Despite these counselings, Rodriguez continued to fail to follow instructions and/or properly communicate with his supervisor. (Tr. 52:12-15, 105:17-21, 285:2-6.)

Rodriguez had the skills to do the job, but just did not appear to want to do the work. (Tr. 105-106.) Torres believed that no one at SVP had worse performance than Rodriguez. (Tr. 113.) For instance, unlike Rodriguez, the other SVP employees working in the same position as Rodriguez did <u>not</u> have issues finishing their work within the workday, and, again, unlike Rodriguez, were not subject to complaints from builders about their performance. (Tr. 85-86.)

Not surprisingly, Torres simply did not feel comfortable or confident relying on Rodriguez. (Tr. 105.) Because Torres was regularly completing Rodriguez's work (Tr. 99-100, 269:2-4), when Millan asked Torres how Rodriguez was doing, Torres ultimately told Millan (his supervisor) that he did not need Rodriguez anymore, as he was doing all the work himself and getting complaints from building supervisors that Rodriguez was not getting the work done. (Tr. 99-100.)

Notably, because Rodriguez's performance was so poor, even Amando Encinas, SVP co-owner who oversees SVP operations, received reports of Rodriguez's performance and communication issues, including that Rodriguez failed to perform tasks as directed, that his failure to complete tasks resulted in a failed home inspection that delayed homeowners from getting into their home on time, and that Rodriguez would not follow his supervisors' directives and hang up on his supervisors during telephone calls. (Tr. 33-34.)

E. SVP Decides To Terminate Rodriguez's Employment

Based on these continued performance issues (insubordination) and Torres' reported concerns during Rodriguez's brief period of employment, SVP began to seriously evaluate Rodriguez's failure to follow simple instructions, combativeness, serious communication problems (like hanging up during calls, ignoring his supervisor's calls and messages), and failure to complete tasks. (Tr. 48-52, 70.) As noted above, even Encinas, SVP co-owner who oversees operations, received complaints about Rodriguez during the short period of time Rodriguez was employed by SVP. (Tr. 33-34.) Mark Millan, general manager, discussed the issues they were having with Rodriquez's performance for at least the last three to four weeks of his employment with Ralph Cozzolino, managing partner at SVP. (Tr. 48-49.) They addressed Rodriguez's repeated failure to complete tasks, and that he appeared to be leaving work early despite having jobs to do. (Tr. 49-52.) Indeed, Cozzolino had observed firsthand on multiple occasions that the Company truck used by Rodriguez during the workday, was returned and parked back at the office early. (Tr. 51.) While Millan reported concerns to Cozzolino, Cozzolino had also received firsthand complaints from builders about Rodriguez. (Tr. 53.) Cozzolino also spoke with Rob Torres directly regarding Rodriguez's failure to complete daily tasks, and Rodriguez's communication problems (like hanging up on calls). (Tr. 49-52.) As noted, Torres and Millan had already addressed these continuing concerns with Rodriquez to no avail (Tr. 52) and no other

SVP employees at that time engaged in such inappropriate behavior as Rodriquez. (Tr. 52.) Rodriguez's performance and conduct violated Company policies. (Tr. 34.)

Based on all these issues, both Cozzolino and Millan, the two ultimate decision-makers[1] (Tr. 53), agreed that termination was necessary (Tr. 48). His termination was based on insubordination for his unsatisfactory work ethic, leaving work early, not completing his tasks, and failure to communicate with his supervisors. (Tr. 28:24-29:1, 49, 68-70, 285, 291.)

Notably, this termination decision was consistent with SVP practice. (Tr. 70-71.) For instance, Jim Cutcher, another former employee, was also terminated by SVP for insubordination based on failure to complete his work. (Tr. 70-71.)

F. SVP Communicates Termination Decision And Rodriguez Engages In Aggressive And Threatening Behavior.

On September 7, 2017 (Tr. 149:15-16), Millan communicated the termination decision to Rodriguez. (Tr. 65.) An office employee, Maria, was also present during this meeting. (Tr. 65.) During this meeting, Millan explained to Rodriguez that he was being terminated for his failure to complete tasks and insubordination. (Tr. 69.) Rodriguez concedes that Millan told him he was being fired for not finishing his work. (Tr. 166:18-22.) Rodriguez responded that this was "bullshit." (Tr. 73.) Millan asked Rodriguez for the keys to the Company truck and he refused to hand them over. (Tr. 74.) Because he refused to give the keys, Millan walked with him to the vehicle, because Rodriguez claimed he needed some stuff from the vehicle. (Tr. 76.) Rodriguez continued to argue with Millan (Tr. 74), put his hands on Millan, told him he was going to "kick his ass", called him a "fucking punk ass pussy," and then Rodriguez also pointed his finger and put it directly on Millan's nose (Tr. 75, 280). When Rodriguez walked back toward the building,

[1] Amando Encinas was not involved in Rodriguez's termination, and only learned of the termination from Millan after Rodriguez was fired. (Tr. 28:18-23.)

he *again* told Millan he was going to "kick his ass." (Tr. 76.) Then, instead of handing Millan the Company truck keys, he threw them towards the building (about 25 feet away from Millan), so he had to go pick them up. (Tr. 278:16-23.) Millan considered pressing charges against Rodriguez for his aggressive and threatening behavior. (Tr. 289:9.) Notably, this was not the first time Millan had showed this type of attitude to Millan. (Tr. 76:23-77:12.)

After he had undisputedly been fired, and after repeatedly threatening Millan, Rodriguez told Millan he was going to "own this company," that he (Rodriguez) would be back working at SVP, that Millan would be fired, that "lots of people" would be fired, and that he was "going to take this to the Labor Board." (Tr. 78.) This was the first time Millan had ever heard Rodriguez make comments about "going to the board"—which again was, undisputedly, after he was terminated. (Tr. 77:22-78:18, 281:5-9.) Rodriguez did not state which labor board he was going to or why, and he not mention any alleged concern with his pay or any condition of his employment prior termination. (Tr. 77:22-78:18, 276:4-6, 281:5-9.)

Later, Mark Millan documented the termination decision in an email to Maria Cabrales (copying Jesse Encinas), dated September 21, 2017, which is consistent with the above-noted reasons communicated to Rodriguez during the meeting. (Tr. 66-67, G.C. Exh. 3.) As the email states, Torres came to Millan as early as August 16, 2017, concerning issues with Rodriguez not completing tasks (even when Rodriguez claimed he had done the job), and that Millan had also personally observed Rodriguez fail to complete tasks, and that Rodriguez also began ignoring his supervisor and hanging up on Torres in the middle of conversation. (Id.) The email further documents that the basis for Rodriguez's termination: insubordination based on these problems. (Id.)

G. Rodriguez Texts Torres And Accuses Him Of "Throwing Him Under The Bus"

Following his termination, Rodriguez texted his former supervisor, Torres, the following: "You tell me that we're catching up and doing good, then tuck tail when super sends emails and bugs you, and you throw me under the bus, buster." (Tr. 179:19-180:16, GC Exh. 5, p. 91.) By using the word, "Buster," Rodriguez was calling Torres a "liar." (Tr. 179:22-180:2.) Notably, in these post-termination text messages, Rodriguez makes no references to the Board, nor does he mention any alleged prior complaint that he was going to go to the Board. (Tr. 179-180, GC Exh. 5, p. 91.) In other words, Rodriguez was accusing Torres of "throwing him under the bus" for work not getting done leading to his termination; his text message referring to his termination had nothing to do with any alleged protected activity. (Tr. 183:2-10, Exh. GC 5, p. 91.)

H. SVP Never Considered Changing Rodriguez's Compensation From Hourly To Piece Rate

Rodriguez was an hourly employee throughout his employment at SVP, earning $18 per hour. (Tr. 29.) All pickups are hourly employees. (Tr. 30.)

Rodriguez claims that he was informed by Torres that Millan had mentioned to him (Torres) that Rodriguez's pay might be changed from hourly to piece rate. (Tr. 164:6-9.) However, pickups are <u>not</u> eligible to be paid at a piece rate at SVP. (Tr. 54-55, 277:10-15, 290:15-22, 183:11-14 (Rodriguez conceding that he knows of no pickups who were paid piece rate.) SVP never considered or ever mentioned paying Rodriguez his compensation under the piece rate method. (Tr. 55, 182) Rodriguez concedes that neither Cozzolino (co-owner, who oversees operations) nor Millan (general manager) ever mentioned to him that his compensation may change to piece work. (Tr. 183.) At SVP, only field installers, a wholly different job category, were paid at a piece rate. (Tr. 54-55.) Rodriguez never complained about his type of compensation or being paid anything other than an hourly rate. (Tr. 30, 54-55, 234:14-20, 277:4-

6.) Contrary to what Rodriguez may claim, Torres never suggested to Rodriguez that Millan was trying to change him from hourly to piecework. (Tr. 234.) Millan also never suggested to Torres that he wanted to change Rodriguez's compensation to piecework; in fact, Millan would have had absolutely no authority to make that type of employment decision. (Tr. 276:16-25.)

III. RODRIGUEZ NEVER SUGGESTED OR STATED TO ANY RELEVANT PERSON THAT HE WAS "GOING TO GO TO THE BOARD."

At no point was anyone involved in the termination decision aware of Rodriguez ever suggesting or threatening that he was "going to go to the board." (Tr. 34:20-22, 54:1-7, 77:22-78:18, 114:12-16, 281:5-9.) No relevant person ever heard Rodriguez state or suggest that was going to "go to the board" before he was terminated. (Tr. 34:20-22, 54:1-7, 77:22-78:18, 114:12-16, 281:5-9.) The only time Rodriguez ever stated or suggested that he was going to go to the board was after Millan had communicated the termination decision to him, and after Rodriguez got angry, raised his voice, and threatened to "kick [Millan's] ass." (Tr. 69-73, 77:22-78:18, 281:5-9.) Amando Encinas, co-owner who oversees SVP operation, was not aware at any time that Rodriguez made any claim he was "going to the board." (Tr. 34:20-22.) Rodriguez alleges that he told Torres earlier in the day of his termination that he was "going to go to the board" (Tr. 164:19-21), which Torres flatly denies ever happened (Tr. 114:12-16); nonetheless, Torres was not a final decision-maker (Tr. 53) and Rodriguez has no personal knowledge or reason to believe (besides sheer speculation), that Torres told the decision-maker(s). (Tr. 181:8-24.)

ARGUMENT

I. GENERAL COUNSEL FAILED TO SHOW THAT SVP VIOLATED SECTIONS 8(a)(1) OR 8(a)(4) OF THE NLRA.

General Counsel has failed to show that SVP violated Section 8(a)(1) or 8(a)(4) of the National Labor Relations Act (NLRA or the "Act"). Under both claims, the General Counsel has

the burden to establish a *prima facie* case of improper motivation by establishing the following four elements: (1) the employee engaged in protected conduct, (2) Respondent knew about such activity, (3) Respondent took adverse action against the employee; and (4) Respondent terminated the employee based on the protected activity. *Wright Line,* 251 NLRB 1083 (1980), *enfd.,* 662 F.899 (1st Cir. 1981), *cert denied,* 455 U.S. 989 (1982); *McKesson Drug Co.,* 337 NLRB 935, 936 (2002)(applying *Wright Line* to Section 8(a)(4)); *Carrier Corp.,* 336 NLRB 1141, 1150 (2001); *Concrete Form Walls, Inc.*, 346 NLRB 831, 847-48 (2006). If the General Counsel meets all these elements, Respondent can still defeat the claim by showing, by a preponderance of evidence, that it took the adverse action for a legitimate, nondiscriminatory business reason. *Id.*

Here, General Counsel has failed to show a *prima facie* case under Section 8(a)(1) and 8(a)(4). In fact, the only element General Counsel can show under either Section 8(a)(1) or 8(a)(4) claim is that SVP took an adverse action against Rodriguez (element 3). The record clearly shows that (1) Rodriguez did not engage in any protected activity (element 1), (2) that SVP had zero knowledge of any protected activity prior to communicating the termination decision (element 2), and that (3) even if there was any sort of protected activity, it did not cause Rodriguez's termination (element 4). Even if General Counsel could show a *prima face* case, the credible, relevant evidence of the record affirmatively establishes that SVP terminated Rodriguez for legitimate, non-discriminatory reasons—insubordination based on his repeated failure to follow instructions and failure to adequately communicate with his supervisors. Accordingly, all claims fail and must be dismissed.

A. Rodriguez Did Not Engage In Any Protected Activity Under the NLRA

General Counsel has not shown element 2 of a *prima facie* case for either the Section 8(a)(1) or Section 8(a)(4) claims.

1. Rodriguez did not engage in any protected activity under section 8(a)(4) of the NLRA

First, the record presents no credible or reliable evidence that Rodriguez engaged in any protected activity related to the Section 8(a)(4) charge. Section 8(a)(4) of the Act prohibits an employer from "discharge[ing] or otherwise discriminat[ing] against an employee because he has filed charges or given testimony under [the Act]." 29 U.S.C § 158(a)(4); *Equitable Gas Co. v. NLRB*, 966 F.2d 861, 865 (4th Cir. 1992). Here, Rodriguez neither filed a charge nor testified to be afforded coverage under Section 8(a)(4) prior to his termination. The credible, relevant and reliable testimony supports that no relevant person (*i.e.*, Millan and Cozzolino, the two decision-makers, as well as Torres, who was not a decision-maker but who regularly dealt with Rodriguez's insubordination) ever heard any sort of complaint from Rodriguez threatening to file a charge under the NLRA. In fact, Rodriguez never threatened to file any sort of charge until after he was fired. (Tr. 34:20-22, 54:1-7, 77:22-78:18, 114:12-16, 281:5-9.)

As the record shows, Rodriguez first told SVP that he was going to the board after Millan told him he was fired and after Rodriguez had aggressively threatened Millan. (Tr. 34:20-22, 54:1-7, 77:22-78:18, 114:12-16, 281:5-9.) Tellingly, during Rodriguez's aggressive confrontation with Millan, Rodriguez also did not specify which board he was going to, why, or what the alleged basis for any claim or charge was. (Tr. 73-78.) Rodriguez concedes that Millan told him that he was being terminated for failing to follow instructions and nothing to do with Rodriguez's alleged gripes about his compensation. (Tr. Tr. 166:18-22.) During and after the termination, there was zero discussion of compensation or any alleged plans to change Rodriguez from hourly to piecework during the termination meeting. (Tr. 73-79, 276:4-6, 281:5-9.) Rodriguez also concedes he never threatened to tell the other decision-maker (Cozzolino) that he would go to the board, or file any sort of charge against SVP. (Tr. 181:8-24.)

Furthermore, Rodriguez's claim that he told Torres he was going to "go to the board" because Torres allegedly told Rodriguez that Millan said he was going to change Rodriguez's compensation from hourly to piece rate is blatantly false and wholly unsupported by the credible, relevant evidence of the record. First, Torres, who does not work at SVP and has no reason to lie (Tr. 266:4-14), credibly testified that the alleged conversation never occurred (Tr. 114:12-16). Torres' testimony is also bolstered by the undisputed fact that SVP does not pay any pickup person piece rate and no pickup person is eligible for such compensation. (Tr. 54-55, Tr. 277:10-15, 290:15-22; 181), and that Millan (who also does not even work for SVP anymore and has "no skin in the game" (Tr. 83:3-5)), also credibly testified that he never mentioned or considered changing Rodriguez's compensation to piece-rate. (Tr. 55, 182, 276:16-25). In fact, he undisputedly would not have any authority to do so. (Tr. 276:16-25.) Even Rodriguez concedes he is aware of no picks ups at SVP who were paid piece-rate. (Tr. 183:11-14.)

Regardless, as noted above, even if Rodriguez did threaten to file a charge against SVP to Torres, it still imputes zero knowledge upon any of the actual decision-makers to establish employer liability under the NLRA, Section 8(a)(4). (See Section I.B., below.)

2. Rodriguez did not engage in any protected activity for a section 8(a)(1) claim

Second, the record does not show that Rodriguez engaged in any protected activity under Section 7 of the NLRA, to meet element 2 of the Section 8(a)(1) claim. Section 7 of the Act provides that "employees shall have the right . . . to engage in other concerted activities for . . . mutual aid or protection." 29 U.S.C. § 157. General Counsel has the burden of proving that the conduct engaged in was actual protected "concerted activity." *Meyers Indus., Inc.* (*Meyers I*), 268 NLRB 493, 497 (1984). The Board has clarified that (1) "concerted activity" and (2) "mutual aid or protection" are distinct concepts that must be analyzed separately, with the

General Counsel being required to prove that the employee's activity consisted of both concepts in order to show a violation of Section 8(a)(1). *Holling Press, Inc.*, 343 NLRB 301, 302-03 (2004) ("the concepts of concertedness and mutual aid or protection are analytically distinct and must be analyzed separately"); *Meyers Indus., Inc.* (*Meyers II*), 281 NLRB 882, 885 (1986).

In this case, General Counsel will likely argue that SVP violated Section 8(a)(1) of the Act by terminating Rodriguez because he allegedly stated that he was going to "go to the board" related to his compensation. Not only did most of Rodriguez's alleged complaints never happen (see Section I.A.(i), above), when the appropriate legal analysis is applied to the facts of this case (and even if considering Rodriguez's alleged gripes as true), it becomes clear that the General Counsel failed to show that Rodriguez in fact engaged in "concerted activity" for "mutual aid and protection" as those concepts have been defined by the Board. Accordingly, this charge must be dismissed without further inquiry.

i. Rodriguez's conduct was not "concerted"

The Act requires that the activities in question be "concerted" before they can be "protected." *Meyers I*, 268 NLRB at 494. To be concerted, an employee's activity must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Id.* at 497 (definition of "concerted activity" upheld in *Meyers II*, 281 NLRB 882 (1986)); *see also KNTV, Inc.*, 319 NLRB 447 (1995). Also, it is not enough to find only that the activity engaged in is a matter of common concern among all employees. The so-called "common concern" standard for concerted activity was explicitly rejected by the Board in *Meyers I*. *Meyers I*, 268 NLRB at 498 (rejecting the standard enunciated in *Alleluia Cushion Co.*, 221 NLRB 999 (1975)). Concerted activity involving an individual employee requires that the employee "seek to initiate or to induce or to prepare for group action" or bring "truly group

complaints to the attention of management." *Fresh & Easy Neighborhood Market, Inc.* 361 NLRB No. 12, slip op. at 3 (2014); *Meyers II*, 281 NLRB at 887.

Rodriguez did none of this. The record affirmatively establishes that none of Rodriguez's alleged complaints or concerns were "concerted." When asked about his co-workers, or others in the pickup position at the hearing, Rodriguez concedes, "I didn't know nobody there. I never got to talk to them about how their work went. . . . I really didn't know of anybody else." (Tr. 183:17-25.) He conceded he didn't know about anyone being paid piece-rate at SVP, and only suggested that he had been paid that way *at a different employer*. (Tr. 183:11-16.) Instead, all of Rodriguez's gripes (whether true or untrue) do not relate to anyone but himself. Furthermore, while unclear from his testimony, to the extent he is somehow complaining about not having enough time to complete his jobs or that he needed more tools, the undisputed record establishes that no other employees struggled to complete their jobs within the workday. (Tr. 85-86.) Again, Rodriguez never talked about work with his co-workers, and didn't even know who they were. (Tr. 183:17-25.) These alleged concerns were not concerted. It is this type of individual chronic complaining that the Board has found not to constitute concerted activity. *E.g.*, *Holling Press*, 343 NLRB at 302 (an activity which is nothing more than "mere griping" does not amount to concerted activity); *Gartner-Harf Co.*, 308 NLRB 531 (1992) (it is not unlawful to terminate an employee who was a chronic complainer and was not a team player).

It is well-established that individual gripes about wages or otherwise are neither concerted nor protected (even if the employee discusses with a supervisor). *See Shamrock Coal Co.,* 271 NLRB 617 (1984); *United Pacific Reliance Ins., Inc.,* 270 NLRB 981 (1984); *Parker Labs., Inc.,* 267 NLRB 1174 (1983); *National Wax Co.,* 251 NLRB 1064 (1980); *Elston Electronics Corp.,* 292 NLRB 510 (1989). Threatening to "go to the board" (without even

specifying for what when talking with Millan) for such an individualized gripe is also not concerted. *Flick v General Host Corp.*, 573 F. Supp. 1086 (N.D. Ill. 1983) (single employee's filing of worker's compensation claim is not protected concerted activity, notwithstanding employee is member of collective bargaining group); *Myth, Inc.*, 326 NLRB 136 (1998) (individual filing of wage claim with state department of labor does not constitute concerted activity); *Ewing v NLRB*, 861 F.2d 353 (2d Cir. 1998) (employee's claim that he was not recalled from layoff because employer suspected that he filed complaint with Occupational Safety and Health Administration was not concerted activity since activity lacked link to group action required for considered concerted). Because the General Counsel failed to show that Rodriguez's conduct was "concerted," the Section 8(a)(1) claims fail and warrants no further inquiry.

ii. Rodriguez's conduct was not for "mutual aid or protection"

For an activity to be for "mutual aid or protection," it is generally required that such activity "inures to the benefit of all." *Holling Press*, 343 NLRB at 302 (quoting *Meyers II*, 281 NLRB at 887). In determining what activity meets this requirement, the Board has moved away from whether the conduct was related to a "common concern" of employees, and now focuses on the "purpose" of the employee's conduct. For conduct to be "for mutual aid or protection," an employee must join with or ask for help from co-workers in addressing an issue with management. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 5. Rodriguez did not seek help from his co-workers or group action, and instead allegedly complained that he was going to go to the board on account of his own compensation (though, as explained, he did not actually say this). Such behavior is not "for mutual aid and protection" under Board precedent.

3. Rodriguez's aggressive and threatening conduct towards Millan eliminated any Section 7 protections

Lastly, Rodriguez's aggressive and threatening behavior towards Millan eliminated any NLRA protections. Here, while Rodriguez alleges he engaged in protected activity by telling Millan he was "going to the board", this is the same conversation, where Rodriguez threatened to "Kick [Millan's] ass" multiple times, called him a "fucking punk ass pussy," put his hands on him, and put his index finger directly onto Millan's nose. (Tr. 69-76, 281:5-9.) To be sure, "any physical threat against the employer cuts in favor of removing the worker from the protection of the Act." *Kiewit Power Constructors Co. v. NLRB*, (D.C. Cir. 2011). This type of activity intended to threaten and intimidate is not protected under the Act. *See*, *e.g.*, *Associated Grocers of New England, Inc. v. NLRB*, 562 F.2d 1333 (1st Cir. 1977) (employee conduct lost Section 7 protections when he followed his supervisor in his car several miles down the road reasonably intended to threaten); *Kiewit Power Constructors Co.*, 652 F.3d at 29 (NLRA does not shield vitriolic or obscene insubordination simply because it is unaccompanied by physical threats). For this reason alone, the General Counsel cannot show that Rodriguez engaged in any protected conduct under the NLRA.

B. Respondent Had No Knowledge Of Any Alleged Protected Activity

As a preliminary matter, any charge against SVP fails because SVP had zero knowledge of any alleged protected activity pertaining to either Section 8(a)(1) or 8(a)(4). It is a basic tenet of labor law that, to prove a case of discrimination, the charging party must establish that the employer had knowledge of the underlying protected activity. *Clark & Wilkins Indus., Inc.,* 290 NLRB 106 (1988); *NLRB v. Burnup & Sims, Inc.,* 379 U.S. 21, 23 (1964). Without knowledge of the employee's alleged protected activity, the employer's conduct toward the employee cannot have been motivated by the applicable protected activity. The decision-makers' ignorance of the

alleged protected activity completely removes the possibility of discriminatory motivation and completely disproves General Counsel's case. *Gibbs Shipyards, Inc. v. NLRB,* 333 F.2d 459, 462 (5th Cir. 1971) ("There is no rule that any discrimination against one who has testified adversely to the employer is automatically an 8(a)(4) violation. Without evidence bringing knowledge of this fact home to management there is no support for a finding that it partially motivated the discharges."); *Central Freight Lines, Inc.,* 133 NLRB 393 (1961) (granting motion to dismiss as it alleged that two employees were discharged for furnishing information to the NLRB General Counsel in violation of § 8(a)(4), because of the NLRB General Counsel's failure to offer any evidence that the employer had knowledge that information had been furnished to the NLRB General Counsel by such employees).

All of Rodriguez's claims can be swiftly rejected as no relevant person was aware that Rodriguez engaged in any protected activity prior to his termination. *El Mundo, Inc.*, 92 NLRB 724 (1950); *Harris-Hub Co.* 142 NLRB 287 (1963); *Tru-Scale Products, Inc.* 147 NLRB 1122 (1964) (rejecting charges where decision-makers had no knowledge of protected activity).

To show element (2) of a prima facie case under the Section 8(a)(4) claim, the General Counsel must have shown that the decision-makers were aware of Rodriguez's threats to "go to the board" prior to his termination. To show element 2 of a prima facie case under the Section 8(a)(1) claim, again, General Counsel must have shown that the decision-makers were aware that Rodriguez had allegedly complained that he was going to go to the Board related to hearsay comments that Millan was going to change his pay to piece-rate. Here, General Counsel has shown neither of these things.

As explained in detail above (Section I.A.), the first time Rodriguez threatened to "go to the board" was after his termination. Millan, Torres, Cozzolino, and Encinas also testified

consistently on this point. (Tr. 34:20-22, 54:1-7, 77:22-78:18, 114:12-16, 281:5-9.) Neither Millan nor Torres are employed by SVP (Tr. 82:20-25, 266:4-14) —they have no reason to be less than forthcoming on this issue. Here, Rodriguez claims that he told Torres that he was "going to the board" the day of his termination because Torres allegedly told him that Millan was going to change his compensation to piece-rate. (Tr. 164:19-21.) Torres credibly denies all of this. (Tr. 114:12-16.) Regardless, Even if Rodriguez made any similar sort of statement to Torres, no evidence in the record shows that any decision-maker was aware of the alleged protected activity prior to making and communicating the termination decision. Rodriguez claims that Torres must have told Millan about his alleged remark(s); yet, Rodriguez concedes that this claim is based on speculation only and zero personal knowledge. (Tr. 181:8-24.) Pure speculation will not suffice. *E.g. J. W. Mays, Inc*., 213 NLRB 619 (1974), *enfd as modified on other grounds*, 518 F.2d 1170 (2d Cir. 1975). Furthermore, any argument that the decision-makers were somehow aware of Rodriguez's alleged concerns related to compensation, this argument is undermined by the fact that there was absolutely no discussion of compensation during the termination meeting, and the fact that no pickups have ever been eligible to be paid at piece-rate. (Tr. 54-55, 183, 234, 276-277.) Because no relevant person or decision-maker was aware of Rodriguez's alleged protected activity (element 2) on or before the termination decision was made and communicated to Rodriguez any and all charges against SVP fail as a matter of law.

C. SVP Did Not Terminate Rodriguez For Engaging In Any Alleged Protected Activity

General Counsel has the burden of proving that the employer's action was discriminatorily motivated. *Electric Motors & Specialties, Inc*. 149 NLRB 131 (1964). It is well-established that suspicion or speculation is not a substitute for the requisite proof of

unlawful motivation. *J. W. Mays, Inc*., 213 NLRB at 619. This applies even where the evidence raises a strong suspicion of discriminatory motivation. *See*, *e.g.*, *Western Lace & Line Co.*, 105 NLRB 749 (1953), *enfd.* 215 F.2d 453 (9th Cir. 1954). When the employer has no knowledge of the protected activity, as is the case here, a finding of discrimination on these ground cannot be made. *Desert Pines Golf Club,* 334 NLRB 265 (2001). Absent a showing of unlawful motivation for the termination decision, an employer may discharge, suspend or discipline an employee for "a good reason, a bad reason, or no reason at all" without being in violation of the Act. *Royalite,* 324 NLRB 429, 438 (1997); *R-W Service System, Inc.*, 243 N.L.R.B. 1202, 1202 (1979). When an unlawful purpose is not present or cannot be inferred as a matter of law, "discrimination" does not violate the Act, even if the employer's conduct is unjustified or unfair. *Borin Packing Co.,* 208 NLRB 280, 281 (1974).

There is simply no evidence that SVP had any sort of unlawful or discriminatory animus when it decided to terminate Rodriguez. First, the General Counsel cannot show any unlawful motivation because, even if accepting Rodriguez's allegations as true, there is zero evidence that any decision-maker was aware of the alleged protected activity before SVP fired Rodriguez. (See Section I.B., above.) Second, as explained in detail below, Rodriguez was terminated for legitimate, non-discriminatory reasons that cannot be refuted. (See Section I.D., below.) Third, Rodriguez was not simply fired out of the blue—his supervisor and manager counseled him to improve his performance to no avail. (Tr. 62, 106, 114, 116, see also Section I.D., below.) When the credible, relevant evidence of the record is considered as a whole, it is clear that the General Counsel has failed to show that SVP had any unlawful or discriminatory motivation in its decision to terminate Rodriguez.

D. SVP Terminated Rodriguez For Legitimate, Non-Discriminatory Reasons

Even if General Counsel could state a claim, the charges must be dismissed because SVP terminated Rodriguez for legitimate, non-discriminatory reasons. *Laidlaw Corp.,* 171 NLRB 1366, 1368 (1968) (an employer's discharge or suspension of an employee is not unlawful so long as it is motivated by legitimate business reasons). To be sure, the NLRA does not deprive an employer its right to discharge an inefficient or disobedient employee. *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 45, 46 (1937); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937). The NLRB does not have managerial authority over the employer, *NLRB v. Jones & Laughlin Steel Corp*, 301 U.S. 1 (1937), and, it's well-established that the NLRA "was not intended to empower [the NLRB] to substitute its judgment for that of the employer in the conduct of his business." *NLRB v. Union Pac. Stages*, 99 F.2d 153, 177 (9th Cir. 1938). This means that the NLRB cannot second-guess the employer's judgment in disciplining an employee or substitute its own judgment, absent any discriminatory animus. The Act also does not absolve employees from compliance with workplace rules and regulations, nor deprive an employer of its right to dismiss or discipline an employee for any cause except where the employee was actually discriminated against because of his or her protected activity. *Id.*

SVP would have terminated Rodriguez even if he hadn't allegedly engaged in protected activity. As the credible, relevant evidence of the record establishes, SVP terminated Rodriguez for legitimate, non-discriminatory reasons: his blatant insubordination, based on his refusal to follow instructions, combative attitude, and failure to communicate with his supervisors (including hanging up on supervisors, not timely responding to text messages, stating that he had completed projects when he had not done so). (Tr. 28:24-29:1, 33-34, 48-49, 53, 68-70, 285, 291.) This is consistent with the final decision-makers' (Millan and Cozzolino) testimony, Rodriguez's supervisor's testimony (who dealt with these problems first hand), and Amando

Encinas' testimony (co-owner who also received complaints about Rodriguez's performance). (*Id.*)

The legitimate, non-discriminatory reason for Rodriguez's termination is further bolstered by the fact that SVP had counseled Rodriguez on his performance and communication issues on multiple occasions prior to his termination. *See Item Co.,* 113 NLRB 67 (1995), *enfd.* 220 F.2d 956 (5th Cir. 1955), *cert. denied,* 350 U.S. 836 (employer did not violate Section 8(a)(4) of the NLRA where the employee had already been counseled on his conduct prior to termination). Torres, his superintendent, repeatedly tried to motivate him to improve, follow instructions, and communicate, to no avail. (Tr. 52:12-15, 105:17-21, 106, 114, 116, 285:2-6.) Even in his text message exchanges—which indisputably occurred prior to any alleged protected activity—specifically directed Rodriguez to follow instruction, do his job, and finish tasks he neglected to finish the prior day. (Tr. 106, 114, 116; GC Exh. 5, p. 66, p. 69.) Millan, Torres' supervisor, also counseled Rodriguez on these performance issues prior to Rodriguez's termination. (Tr. 62.) Moreover, it was not just his supervisors that were frustrated with Rodriguez's work and conduct, builders also complained about Rodriguez's failure to follow through on tasks as well as his angry, rude, and combative behavior (including hanging up on phone calls). (Tr. 247, 277-278, 284-285.) *See, e.g., Loby's Cafeteria,* 192 NLRB 752 (1971)(dismissing charge where pastry cook was discharged after customer complaints about the baking).

Furthermore, to the extent Rodriguez tries to argue that he couldn't finish his work because he didn't have certain tools or enough time in the day, this simply does not dispute the fact that he did not follow instructions as directed. Torres and Millan offered Rodriguez tools, but by the time offered or brought them, Rodriguez was long gone and the job was left undone.

(Tr.109-110, 284:18-285:3.) Further undermining any such argument is the fact, which was not disputed, that no other pickup person failed to follow instructions or complete jobs like Rodriguez did. (Tr. 85-86.)

Lastly, Rodriguez's termination is consistent with SVP's past practice of terminating employees for insubordination based on failure to complete tasks and/or follow directives. (Tr. 70-71.) Ultimately, there is simply no evidence in the record to refute that Rodriguez was terminated for legitimate, non-discriminatory reasons, which were wholly unrelated to any alleged protected conduct.

CONCLUSION

For of all of these reasons, the General Counsel has failed to show that SVP violated Sections 8(a)(1) or 8(a)(4), and the Complaint should be dismissed with prejudice in its entirety.

Dated this 31st day of October, 2018.

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